

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE

AND

IN THE MATTER OF THE COMPLAINTS MADE BY THE
ONTARIO HUMAN RIGHTS COMMISSION AND MR. CEZAR
ABARY ALLEGING DISCRIMINATION IN EMPLOYMENT BY
NORTH YORK BRANSON HOSPITAL AND EDWIN HILL

DECISION ON
MOTION TO PROCEED
WITH HEARING

ED RATUSHNY, Q.C.
BOARD OF INQUIRY

DECISION ON MOTION TO PROCEED WITH HEARING

The complainants in this matter are Mr. Cezar Abary and the Ontario Human Rights Commission. The hearing commenced on November 24th but prior to evidence being adduced, an adjournment was granted sine die. This Board was informed that terms of a settlement had been formally agreed upon but were no longer acceptable to one of the parties. Counsel for the Ontario Human Rights Commission agreed to the adjournment in order to permit counsel for the Respondent to seek enforcement of the disputed "settlement" in a court of law. Mr. Abary was not represented by counsel at this time.

The Respondent commenced an action in the Supreme Court of Ontario against the Complainant, Cezar Abary, seeking an injunction requiring the defendant to abandon these proceedings and a declaration that the complaint has been settled.

Counsel for Mr. Abary has now applied to have the hearing of the complaint by this board of inquiry proceed as quickly as possible. He argued that since Mr. Abary no longer concurs in the settlement which had been reached, there is no "agreement" or "consent order" for the purposes of section 4 of the Statutory Powers Procedures Act. Therefore, the board of inquiry should simply proceed with its statutory mandate.

The Commission now appears to have reversed its earlier position. Its current position is that the complaints have not been settled and that the hearing before this Board should proceed. Counsel for the Commission and for Mr. Abary expressed concern about the delay which would be caused by the nature of the proceedings which were commenced but counsel for the Respondent replied that, in fact, Mr. Abary was the cause of the delay in failing to file a defence. Counsel for the Respondent indicated that the Commission would be added as a

defendant in the action and argued that this litigation should now be permitted to take its course.

Counsel for Mr. Abary and for the Commission invited this Board to inquire into the circumstances of the "settlement". However, counsel for the Respondent was opposed in the event that it should become necessary to proceed with the hearing. The Board declined to inquire into the "settlement".

There is much to be said for continuing the adjournment to permit the validity of the "settlement" to be established by the courts. If the parties can reach an agreement as to the appropriate disposition of a complaint, that is often preferable to a lengthy adversarial hearing. This has been recognized in numerous board decisions deferring to consent orders. Moreover, once an agreement has been formalized and signed it is desirable that it be treated seriously. Otherwise, there would be no finality to the process of negotiation leading up to settlement. Arrangements for hearings could be abandoned on the basis of a settlement only to have one of the parties whimsically withdraw prior to the acceptance of the settlement by a board of inquiry.

On the other hand, section 4 of the Statutory Powers Procedures Act provides that settlements are permitted unless "the tribunal otherwise directs". This suggests a recognition that tribunals may be responsible for conducting proceedings which transcend in importance the interests of the specific parties before them. That certainly may be the case in relation to the Ontario Human Rights Code. In the case of Bhadauria v. Board of Governors of Seneca College [1981] 2 S.C.R. 183, the Supreme Court of Canada held that the Code was all-embracing and precluded a common law action for damages based on discrimination.

The obvious disagreement as to the terms of the purported settlement in this case is another factor to be weighed, particularly where the Commission now opposes it. Another factor to consider is

that Mr. Abary was not represented by counsel when the negotiations were conducted or when the initial adjournment was granted.

Counsel informed the Board that no authorities could be found which would shed light on this matter and none were cited.

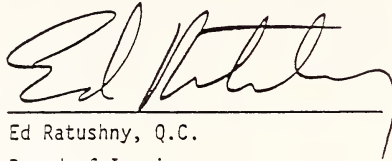
In all of these circumstances, I am of the view that this board of inquiry should proceed to conduct the hearing into these complaints as quickly as possible. A settlement may be a desirable alternative to an adversary proceeding where there is clear agreement. However, where the "settlement" is disputed and where one of the parties was unrepresented during the negotiations, the objectives of the Ontario Human Rights Code are better served by dealing directly with the merits of the complaints. Counsel for the Respondent conceded that even if the action were to succeed and the "settlement" were to constitute a valid contract in law, it would have to be approved by this board of inquiry to be effective.

In the event that the board of inquiry should uphold the complaints, the circumstances of the "settlement" might be considered in determining the nature of the order that should be made. In the event that the complaints should be dismissed, these circumstances might be considered in relation to a possible order for costs under section 40(6) of the Code.

All of the counsel agreed that if the hearings were to proceed, the most expeditious way to set dates would be to arrange a conference telephone call. I, therefore, request that counsel for the Commission contact counsel for Mr. Abary and counsel for the Respondent to establish a time when all three counsel can be available and inform me. I can make myself available any time during the week of April 27th to May 1st for this purpose. As soon as I receive the agreed upon date and time, I will make arrangements for the conference call and confirm them with all three counsel.

Counsel for the Respondent indicated that if the hearing were to be scheduled to proceed, he would consider applying for a judicial order in the nature of prohibition. That is not a matter to be considered at this time and should not inhibit the setting of dates.

Dated April 22, 1987.

A handwritten signature in dark ink, appearing to read 'Ed Ratushny', is written over a horizontal line.

Ed Ratushny, Q.C.
Board of Inquiry

THE HONOURABLE

MR. JUSTICE FITZPATRICK

) FRIDAY, THE 31st DAY
) OF JULY, 1987

278 A

B E T W E E N:

NORTH YORK BRANSON HOSPITAL

Applicant

- and -

BOARD OF INQUIRY, CHAIRMAN
PROFESSOR ED RATUSHNY,
THE ONTARIO HUMAN RIGHTS COMMISSION,
and MR. CEZAR ABARY

Respondents

ORDER

THIS APPLICATION made by the North York Branson Hospital for a declaration that Minutes of Settlement executed on November 24th, 1986, are binding on all the parties and for an injunction requiring the defendant to abandon the proceedings before the Human Rights Commission was heard this day.

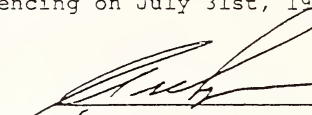
ON READING the application records of the applicant and the respondent, Ontario Human Rights Commission, and the factums filed on behalf of the applicant and the respondents, the Ontario Human Rights Commission and Mr. Cezar Abary, and on hearing the submissions of counsel for the applicant and the respondents, the Ontario Human Rights Commission

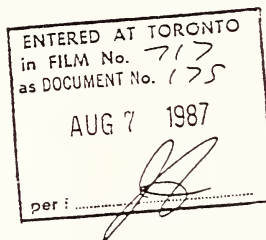
and Mr. Cezar Abary, no one appearing for the Board of Inquiry, Professor Ed Ratushny, although properly served as appears from the affidavit of service filed herein,

1. THIS COURT ORDERS that this application be and the same is hereby dismissed.

2. THIS COURT ORDERS that the applicant pay to the respondents their costs of this application forthwith after assessment.

THIS ORDER BEARS INTEREST at the rate of 10
per cent per year commencing on July 31st, 1987.


10/07/87 Local Registrar 1210



THE ONTARIO HUMAN RIGHTS COMMISSION
and MR. CEZAR ABARY

Court File No. 1498

SUPREME COURT OF ONTARIO

PROCEEDINGS COMMENCED AT Toronto

ORDER

Attorney General for Ontario,
Crown Law Office, Civil,
17th Floor,
18 King Street East,
Toronto, Ontario
MSC 1C5

(Kim Twolig, Counsel)
(965-5571)
Solicitor for the Respondent The
Ontario Human Rights Commission

